ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

September 15, 2003

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation in CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this letter is to provide notice in the above-captioned docketed proceeding of an *ex parte* meeting on September 12, 2003, by Jonathan Askin of the Association for Local Telecommunications Services (ALTS) with Christopher Libertelli, Senior Legal Advisor to Chairman Powell. In reviewing the record in the above-captioned proceeding, ALTS had noticed a series of brief letters from the Bell Companies indicating that they have been meeting with the FCC to discuss the need for additional relief not afforded them by the FCC's UNE Triennial Review Order released on August 21. ALTS was attempting to follow-up on these Bell *ex parte* meetings to ascertain what the Bells have been speaking to the FCC about with regard to the above-captioned proceeding. Mr. Askin expressed concern that the Bells might be attempting to effectuate substantive changes to the UNE Triennial Review Order through a series of, what the Bells might allege to be, innocuous word changes and clarifications to the Order.

While the absence of more forthcoming *ex parte* letters from the Bells on this issue makes it impossible to determine the full scope of the changes they propose, it appears that they have asked the FCC to expand the scope of the unbundling exemption established in the Triennial Review Order for fiber-to-the-home to apply to (1) fiber-to-the-pedestal, a rather amorphous concept that apparently covers a wide range of loop architectures in which the ILEC's fiber extends close to the end user and is connected to copper loops that terminate at the end user premises and (2) fiber loop facilities serving businesses (apparently without regard to capacity). As Mr. Askin explained, any such relief would result in a substantial, unwarranted and unlawful change to the conclusions reached in the Triennial Review Order.

First, as the FCC recognized in crafting the loop unbundling rules, the ILECs maintain serious advantages in deploying loop plant, not just through access to their captive consumer base, but also because of superior access to conduits and other rights of way. The only relevant exception to this conclusion recognized by the FCC is fiber-to-the-home. The FCC found that competitors and incumbents are essentially in the same position to deploy such facilities (see paragraphs 275-276), and, based almost entirely on this finding, it established special relief from unbundling for those facilities. In doing so, the FCC expressly "recognize[d] that other 'fiber-in-the-loop' network architectures exist, such as 'fiber-to-the-curb' (FTTC), 'fiber-to-the-node' (FTTN), and 'fiber-to-the-building' (FTTB)." See n. 811. Nevertheless, because there is no basis in the record for concluding that incumbents and competitors are in the same position to deploy such arrangements, the FCC specifically "exclude[d] such intermediate fiber deployment architectures" from the relief adopted in the order. Id. The reason for drawing this careful distinction is obviously that arrangements in which the ILEC relies on existing copper facilities allows it to exploit the first-mover advantages (in terms of access to rights-of-way and so on) resulting from its historic monopoly. Redrawing the line without any basis in the record and without any opportunity for interested parties to comment on this substantial change would result in a violation of the

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Administrative Procedure Act and would leave no basis upon which an appellate court could review the reasonableness of this 13th hour rewrite. In addition, drawing the line for deregulation somewhere "close" to the customer would be simply unworkable, because there is no way to consistently define what it means to be "close." The ILECs would therefore have endless opportunities to game the rules. Moreover, such gaming would squarely undermine the requirement that ILECs comply with more extensive unbundling obligations (i.e., access to TDM functionalities) for hybrid loop-fiber facilities.

Second, Mr. Askin explained that there is no basis for extending the relief for fiber-to-the-home to include fiber built to business customers (even where the fiber extends all the way to the business premises). Any such relief would arbitrarily limit the availability of unbundled dark fiber loops as well as DS1 and DS3 loops provided over ILEC fiber end user connections. These requirements are the very centerpiece of the Commission's enterprise loop unbundling rules. Moreover, given that the policy underlying the FCC's relief for fiber-to-the-home unbundling was based entirely on an examination of the mass market and that residential consumers constitute the vast majority of that market, it makes sense to limit the scope of the rule to fiber-to-the-home (rather than to the premises). Any proposal to change that result must be made available for public comment and considered in light of a complete record regarding the implications for the business markets and the viability of the bedrock requirement that dark fiber loops as well as DS1 and DS3 loops provided over ILEC fiber be unbundled.

If you have any questions about this matter, please contact me at 202-969-2587.

Respectfully submitted,

/s/

Jonathan Askin

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